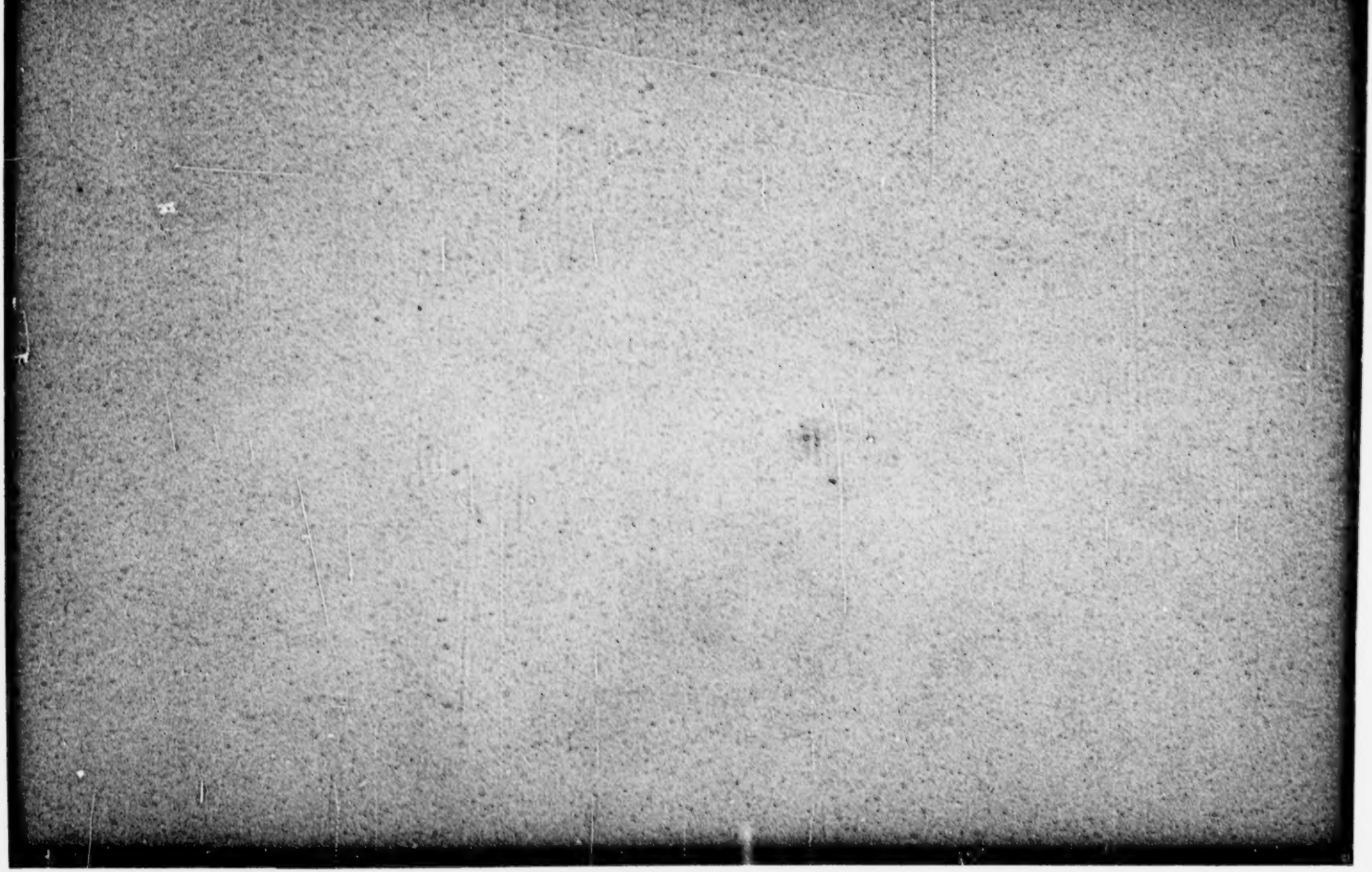

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-53

JOE K. DEVITA,
Petitioner,
v.
BURLINGTON NORTHERN, INC.,
Successor in interest by merger to
Great Northern Railway Company,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

Opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a district court trial de novo on factual determinations made by the National Railroad Adjustment Board under 45 U.S.C. § 153 First (q).

2. Whether National Railroad Adjustment Board findings on procedural issues are reviewable de novo in the district court or whether such findings are conclusive on the parties under 45 U.S.C. § 153 First (q).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix E).

ARGUMENT

1. The scope of review of a National Railroad Adjustment Board award was before this Court in *Gunther v. San Diego & Arizona E. Ry.*, 382 U.S. 257 (1965) and *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). In both cases the statutory language was construed to mean that Congress intended that minor grievances of railroad workers would be decided finally by the National Railroad Adjustment Board. *Brotherhood of R. I. v. Chicago R. & T. R.R.*, 353 U.S. 30 (1957); *Union P. R.R. v. Price*, 360 U.S. 601 (1959); and *Locomotive Engineers v. Louisville & N. R.R.*, 373 U.S. 33 (1963). No conflict exists among the circuit courts. A precisely similar issue was recently decided by the United States Court of Appeals for the Eighth Circuit on January 27, 1972, in *Barrett v. Manufacturers Ry.*, 453 F.2d 1305 (1972), *affirming* 326 F. Supp. 639 (E.D. Mo. 1971), holding that procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. Other courts of appeal have upheld time limitation rules in collective bargaining agreements, *Larsen*

v. American Airlines, Inc., 313 F.2d 599 (2d Cir. 1963) and *Arnold v. United Air Lines, Inc.*, 296 F.2d 191 (7th Cir. 1961).

2. In this case the decision turned solely on its own facts. The National Railroad Adjustment Board ruled that the petitioner had not timely progressed his grievance, a fact which he admitted before the Board, but sought excuse from such compliance by claiming that he did not receive the notice. On conflicting presentations by the carrier and the employee, the National Railroad Adjustment Board made a finding that the petitioner had received the notice and that he did not timely appeal. The record before the National Railroad Adjustment Board leaves little doubt that petitioner did actually receive the notice; hence, it could not be said that there was no evidence to support the Board's conclusion. The issue is simple and factual, and does not under any circumstance warrant review on certiorari.

3. The decision of the National Railroad Adjustment Board was correct on the facts, and the decision of the Court of Appeals was correct on the law. Whether the time limit rule be termed procedural or substantive, the rule limiting the time within which either the carrier or the employee may take an appeal was a negotiated segment of the collective bargaining agreement which required both parties to expedite resolution of employee grievances. The National Railroad Adjustment Board decision was not based upon any principles of abstract industrial justice, but rather on a specific rule of time limitation to which both the carrier and the employee had agreed. To ignore the time limitation rule and arbitrarily require all em-

ployee grievances to be determined on the merits of the dispute itself would clearly violate § 153 First (q) and would effectively eliminate any time limitation rules in collective bargaining agreements.

CONCLUSION

The petitioner does not claim that the Court of Appeals decision herein is in conflict with the decisions of any other circuits or is contrary to any decision of this Court There is no important question of constitutional law requiring review by this Court. For the foregoing reasons, respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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